Consolidated Freightways Corporation of Delaware *and* Thomas C. Reiber. Cases 9-CA-14057 and 9-CA-15060

September 14, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 20, 1981, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and supporting brief, and Respondent filed cross-exceptions and a supporting brief, as well as a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Consolidated Freightways Corporation of Delaware, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

In adopting the Administrative Law Judge's finding that Respondent lawfully disciplined steward Thomas Reiber for his conduct while contesting Respondent's alteration of an employee timecard, we do not rely on her observation that it was significant that Reiber's "obscene outburst" took place on the dock in the presence of other employees rather than as part of the *res gestae* of a grievance hearing.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: Upon charges filed on June 29, 1979, and March 17, 1980, by Thomas C. Reiber against Consolidated Freightways Corporation (hereinafter Respondent), the General Counsel issued an amended consolidated complaint on May 5, 1980, alleging that Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. By timely answer, Respondent denied the commission of the alleged unfair labor practices. A hearing at which all parties were represented was held before me in Cincinnati, Ohio, on December 1-5 and 8-12, 1980.

Upon the entire record,[1] and my observation of the demeanor of the witnesses and consideration of the post-hearing briefs, which I found most helpful, I make the following:

The Issues

The General Counsel alleges that in order to be rid of Union Steward Thomas Reiber, an effective representative of unit employees, Respondent unlawfully (1) threatened Reiber with discharge for meeting with a senior corporate officer and discussing with him work-related concerns, (2) showered him with a series of unwarranted disciplinary warning notices, and (3) discharged him on June 19 and when that discharge was reduced to a suspension discharged him again 6 months later.

Respondent denies that antiunion considerations were involved and contends that Reiber's discharges were in response to flagrant misconduct on his part which was far in excess and unconnected to his authority as a steward. Thus Respondent submits that the June discharge was provoked by an incident in which Reiber altered a supervisor's entry on another employee's timecard, while the dismissal in December came after Respondent determined that Reiber was overstaying his authorized breaks, an offense referred to in the trucking industry as stealing time.

An additional threshold question is presented as to whether deference should be paid, as Respondent contends, to two arbitration panel decisions finding a suspension warranted on one occasion and upholding Reiber's discharge on another.

[1] After the close of the hearing, Respondent made three motions requesting revisions of the official record in this case.

(a) The first such motion proposed various corrections of the transcript. Errors in the transcript, in certain respects, are hereby noted and corrected.

(b) Respondent's second post-trial motion was to substitute original documents where copies of exhibits were admitted into evidence. Having heard no opposition from the General Counsel, and for good cause shown pursuant to Fed. R. Evid. 1003, the originals of Jt. Exhs. 113 and 114 and Resp. Exhs. R-2, 73-A, B, and C are admitted into evidence in lieu of copies.

(c) Respondent also moved that the General Counsel be required to substitute the original for a copy of its Exh. 2-50. On February 24, 1981, an order issued directing the General Counsel to substitute the original document or, alternatively, to file a statement of position as to whether the exhibit in question was written by Thomas Reiber in blue ink. The General Counsel represented, in a telegraphed response, that p. 2 of G.C. Exh. 2-50 was completed by the Charging Party in blue ink on June 19, 1979. Accordingly, I find this statement constitutes adequate compliance with my Order and Respondent's motion.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation with an office and place of business in Cincinnati, Ohio, has been engaged in the interstate and intrastate transportation of freight. In the course and conduct of its business operations, Respondent derives annual gross revenues in excess of $50,000 for the transportation of freight and commodities from Ohio directly to points outside that State. Upon the foregoing facts, the General Counsel alleges, Respondent concedes, and I find that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers, Chauffeurs and Helpers, Local Union No. 100, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's Cincinnati terminal, part of a nationwide network, has a work force of 200 employees who for many years have been represented by Local 100 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The Charging Party, Thomas Reiber, first employed by Respondent as a driver in 1965, served as alternate steward for several years and then as steward from April 1978 until his discharge in December 1979.

The record provides ample evidence that Reiber pursued his union responsibilities ardently and aggressively. He was concerned principally with handling grievances for the approximately 25 city drivers and 120 dockmen in the unit in accordance with the terms of the parties' National Master Freight Agreement. As the first step in the multi-tiered grievance process, employees discussed their complaints with Reiber each workday morning. He apparently was successful in resolving many of these complaints at the initial phase through informal daily dialog with management. However, approximately 30 grievances a month which could not be so readily settled were reduced to writing and presented at regularly scheduled weekly meetings attended by Reiber, two alternate stewards, Terminal Manager John Jankovich, and Assistant Terminal Managers George Flaig and Jim Pawlowski. No one denies that these meetings were intense and heated with profanity often exchanged on all sides. Judging by the number of grievances settled at these sessions, Reiber was an effective negotiator, for only 2 to 3 of the over 30 written complaints a month remained to be presented to the Joint Local Area Panel, the next step in the grievance machinery, whereas 12 to 15 complaints a month were forwarded under the stewardship of his predecessor.

Fellow employees testified that Reiber relished his union duties and attended to them with a greater zeal than had other stewards. He frequently devoted time after work discussing union issues on the phone with coworkers and would actively search for potential breaches of the contract.[2] Thus, Reiber's role as steward cast him into daily confrontations with management and he made little effort to be diplomatic about his success in winning monetary adjustments for grievants.

Jankovich conceded that Reiber may have been regarded as a forceful steward by his coworkers, but based on his 12 years' experience both at the Cincinnati and other Consolidated Freight terminals, he maintained that Reiber's union activities were not unique, that contentious encounters between union representatives and management were commonplace in the trade and that Reiber did not accomplish more than the prior steward or his successor. Thus, Respondent contends that it was not Reiber's conduct as a steward which accounted for each of his three discharges in 1979.

The January 1979 Suspension

The master freight agreement permitted Respondent to employ casual labor, that is, workers who were not required to join the Union until 30 days following the date of their employment. However, work first had to be offered to the 10 percent of Respondent's employees with least seniority, who were not guaranteed a 40-hour week or to any other regular employee on layoff.

Respondent's resort to casuals was a source of irritation for the Union and for the "ten percenters." Further, it was a matter about which Reiber frequently railed. The Union insisted that any casual who worked for 4 days within a 30-day period was required to join the Union and extracted understandings from the other freight delivery firms in Cincinnati that they would hire only those casuals who complied. Jankovich informally promised Reiber that he, too, would attempt to employ only union-member casuals, but officially Respondent's position was that the collective-bargaining agreement did not require this.

On Saturday, December 30, the situation came to a head. During the previous week, Respondent found no need to call upon the "ten percenters," and, on the morning of December 30, Assistant Terminal Manager Flaig assured Reiber that the Company would not be using casuals that day. However, according to Jankovich, more freight arrived for transshipment that day than had been anticipated and, after exhausting the list of available regular employees, 10 to 12 casuals were called for for the 4 p.m. shift. When Reiber was advised by the alternate steward, Bill Reese, that casuals were being summoned, he, with Local 100's president, Gerald Kaiser, and the other alternate steward, Donald Jackson, converged at the terminal gate and demanded that the incoming casuals produce union membership cards. Casuals failing to produce cards were turned away. On learning that two casuals had slipped by, Reiber confronted them on the terminal dock. He cursed and yelled

[2] For example, Reiber urged senior drivers to sign up on lists posted for weekend work. He would later check to determine whether management had, during the weekend, called upon junior employees rather than first offering the work to the more senior drivers. If senior drivers were bypassed, Reiber would insist that management compensate them.

that they would need a guard if they did not leave. He raged that they would never work for the Company again and ordered the regular workers to boycott them.[3] During this episode, work at the dock halted for almost an hour, causing a 3-day delay in the transfer of some freight.

After deciding it would be best to dismiss the casuals, Flaig told Reiber that he was under investigation for causing an unlawful work stoppage. Reiber retorted defiantly that, as long as the Company continued to use casuals, he would continue to stop them.

At a meeting called by management several days later, on January 2, Reiber acknowledged that he was responsible for the incident and that it was not authorized by the Union. Management then determined to discharge both Reiber and Jackson under the terms of the collective-bargaining agreement which prohibits stewards from engaging in unauthorized work stoppages.[4] Subsequently, through the intercession of the Local's president, Respondent was persuaded to reduce the discharges to 2-week suspensions.

The Meeting With Guy Cutler

Several weeks after the work stoppage brouhaha, Reiber telephoned Respondent's senior vice president of terminal operations, Guy Cutler, at his corporate offices in California and requested a meeting to discuss Respondent's proposal for a flexible week; that is, a scheduling arrangement which entailed the abolition of weekend overtime pay.[5] Cutler had visited the Cincinnati terminal previously to persuade employees to accept the flexible workweek.

As agreed, Reiber met with Cutler for an hour at his hotel room on January 23. They discussed the flexible workweek, with Reiber suggesting that he would support the proposal if management made certain concessions. Reiber also spoke of other problems at the terminal which he attributed to poor management. The meeting terminated cordially. Cutler promised to look into some of the matters Reiber raised and asked him to keep their discussion secret.

Unfortunately, Reiber ignored Cutler's admonition. The next morning he not only told several employees about his interview, but he also mentioned it to Flaig. Flaig immediately reported it to Jankovich who conveyed the information to his boss, Carl Meyer, manager of Respondent's southern division. Meyer called his supervisor who was attending a conference with Cutler and confirmed that the meeting had in fact occurred. Cutler called Meyer and apologized for his indiscretion, but did not relate any details of his conversation with Reiber.

That same morning, during the course of the regular union-management weekly grievance meeting, Meyer called Jankovich from the room and told him he had confirmed that Cutler met with Reiber. Meyer returned to the meeting with Jankovich and reprimanded Reiber for flouting the Company's chain of command. Jankovich alleged that his comment to Reiber, spoken facetiously, was: "[Y]ou're beautiful." However, Reiber contended, with corroboration from Jackson and Reese, who also were present at the meeting, that Jankovich threatened, "I will say anything, sign anything or do anything to get you off the seniority list."

Considering the rapidity with which management officials sought to confirm Reiber's story, Jankovich's insistence that any irritation he felt at the grievance meeting was directed solely at Cutler is difficult to believe. If the matter was of such consequence as to drive Jankovich to report immediately to Meyer and for Meyer to seek an apology from Cutler, it is hardly likely that Jankovich reacted tamely to Reiber. Rather, it is far more probable that Jankovich, not unused to doing battle with Reiber, and outraged by what he might well have regarded as another example of the steward's audacious and unorthodox style, would erupt with the threat attributed to him.

The June 1979 Suspension

Some few months after the Cutler imbroglio, Reiber received a series of warning notices charging him with various infractions of company policies. Flaig testified that, based on these warnings, he was preparing to hold a hearing on Reiber's overall work record when a serious incident occurred, which hastened the hearing and was the basis of his discharge on June 19.

On June 15, after an employee, Gary Breeden, took a 20-minute break and then announced he was leaving work early, Freight Operations Manager Ronald Shoenhoff altered his timecard to show a quitting time of 2:10 p.m. rather than 2:30 p.m. Alternate Steward Reese took strong exception to what he regarded as Shoenhoff's unfair action and argued with him about it for almost an hour. Then, Reiber returned to the terminal and took up the cudgels on Breeden's behalf. Precisely what occurred in the ensuing encounter between Reiber and Shoenhoff is in sharp dispute.

Reiber contended that, with freight bills in his right hand, he started to pick up the timecard with his left hand from a ledge outside the dispatcher's office window. Shoenhoff threatened to take Reiber out of service[6] and followed through on his threat by suspend-

[3] Reiber denied threatening the casuals with bodily harm. However, given his anger on this occasion and his admission that he demanded that the casuals leave, I credit the testimony of two supervisors who were present at the scene and heard the threat. The General Counsel submits that it is unlikely that Reiber threatened the casuals since they all left the terminal together. The record suggests that Reiber left close in time to the casuals' departure, but there is nothing which proves they left together.

[4] Art. 4 of the master freight agreement provides that "job stewards alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Union. . . . The Employer . . . shall have the authority to impose proper discipline, including discharge, in the event the job steward or his . . . alternate has taken unauthorized strike action, slowdown or work stoppage in violation of this agreement."

[5] Pursuant to the collective-bargaining agreement, employees had to acquiesce to the introduction of the flexible workweek. Employees at several other terminals had voted their approval, but the Cincinnati terminal drivers had rejected it by a vote taken in 1976. Reiber had opposed the flexible workweek at that time and may have been instrumental in its defeat.

[6] "Taking an employee out of service" is the term used for a suspension pending an investigation.

ing him just as Reiber lifted the card. Reiber reacted by flinging the freight bills and timecard downward to the platform floor.

Shoenhoff testified, however, that, when Reiber picked up the timecard with pen in hand, he told him not to mark on it. Reiber ignored his instruction and scratched out Shoenhoff's entry. Shoenhoff then suspended Reiber. At this point, the steward hurled some obscene and defamatory insults at him and flung his papers, some of which struck Shoenhoff in the chest.[7] As Reiber was yelling and cursing, Shoenhoff ordered him off the property. When Reiber retorted by challenging the supervisor to throw him off, Shoenhoff proceeded to call the police.

In sorting fact from fiction, I find Shoenhoff's version of this episode to be the more plausible for a number of reasons. First, Reese, who was present throughout this confrontation, heard Shoenhoff tell Reiber not to mark the timecard. Although Reese never saw Reiber actually write on the card, he was not always in a position to maintain a clear view of them. Further, Reese believed that Reiber had placed his freight bills on the ledge when he retrieved the timecard so that he would have had a free hand to write on the timecard. It makes little sense for Shoenhoff to warn against writing on the timecard unless he perceived that such conduct was imminent. Moreover, examination of the timecards by the steward was an everyday occurrence. Shoenhoff surely knew that suspending Reiber for that reason alone would hardly pass muster at a disciplinary hearing. At the company hearing on June 19, Reiber's statement that if Shoenhoff could mark on the timecard so could he was hardly the remark of one who had not marked the card. Finally, in his defense, Reiber pointed out that he invariably used a pen with black ink and therefore could not have made the blue scratchings on the Breeden timecard. However, Respondent introduced into evidence the originals of several documents dated June 2 and 19 which bear Reiber's handwriting in blue ink. Although this may not prove that Reiber had a blue ink pen on June 15, it certainly suggests that he may have. Finally, between the time that Reiber threw the timecard down and several moments later when Shoenhoff pointed out the scratching to a fellow supervisor, no one else touched it. All these circumstances point in only one direction: Reiber, directly defying Shoenhoff's instructions, marked the timecard and then subsequently denied he had done so. He unleashed a torrent of intemperate abuse against a supervisor who throughout the incident, according to all accounts, remained uncommonly calm. Then, Reiber left the scene with a taunt to Shoenhoff to fight.

Other Alleged Misconduct

Although June hearings at the company level and before the Local Joint Area Committee[8] focused primarily on the Breeden timecard incident, Reiber's disciplinary record for the preceding 9 months also was considered, as was permitted by contract. Thus, in addition to the January suspension for cessation of work, nine other warning notices issued to Reiber during this period became part of the proceedings and are discussed below. Reiber was discharged by Respondent at the conclusion of its hearing on June 19, but was reinstated with a 2-week suspension by decision of the local joint committee.

Delay of Freight: Between April 23 and June 8, 1979, Reiber received five warning notices for the delay of freight. By this, Respondent was referring to Reiber's practice of meeting with employees each morning for what the Company regarded as excessive periods of time, and thereby being unavailable or refusing to deliver freight when dispatched.[9]

The master freight agreement provides only that the steward shall have "a reasonable time to investigate, present and process grievances on the company property without loss of time or pay during his regular working hours without interruption of the Employer's operation by calling group meetings."

Reiber maintained that he would take as much time as necessary to hear complaints and discuss work-related questions raised by the employees. Indeed, the record shows that Reiber consistently met with three or four employees every day, in sessions that lasted from 8 until 9 a.m., and frequently did not end until 9:30 or 10 o'clock. Alternate Steward Jackson often was present throughout these sessions, yet, as the General Counsel points out, he received only one such warning letter. In Respondent's view, Reiber was entitled to no more than one-half hour each morning on company time. Jankovich testified that he made the Company's position known to two of Local 100's business agents. Flaig further explained that the Company decided to make an issue of Reiber's extended meetings in the belief that he was abusing the "reasonable time" provision by discussing extraneous matters with employees.

What is meant by reasonable time is not given precise definition either in the collective-bargaining agreement or in the Company's rules. However, Hal Franke, management's chairman of the joint local area committee which heard Reiber's grievance, expressed the view, in the presence of the union representatives on the panel, that one-half hour for grievance processing was more than reasonable and comported with industry practice.

Failure To Complete Shift: The Company rarely made an issue of employees leaving work early as long as they gave notice of their departure to their supervisors. Yet, prior to June 19, Reiber received several warning notices for failing to complete his 8-hour shift. The first letter, dated February 19, 1979, reprimanded him for clocking out of work a little more than an hour after his arrival to attend to union business without obtaining union authori-

[7] It is unnecessary to determine whether Reiber meant to strike Shoenhoff with his freight bills. The men were standing only 2 feet apart and, regardless of Reiber's intent, some of the material could have struck Shoenhoff.

[8] The collective-bargaining agreement established a joint local area committee, composed of an equal number of employer and union representatives as the next step in the grievance machinery following dispute adjustments at the company level.

[9] A typical letter read, "[Y]ou were dispatched at 0815 hours, however at 0910 hours you were still on the dock. No reason was given for the delay." (Jt. Exh. 112.)

zation pursuant to the collective-bargaining agreement.[10] Reiber had never before been asked to comply with this contractual provision. However, Flaig explained that the warning was sent after Reiber left work early on numerous occasions ostensibly for union business. In fact, the record shows that Reiber ascribed his early departures to union matters five times in the 5 weeks subsequent to his January suspension. Another letter for failing to complete his shift issued in May, although Reiber's supervisor failed to dissent when Reiber mentioned that he would be leaving early.

Punching in Timecard: Still another warning issued to Reiber in May for punching in Bill Reese's timecard in direct contravention of an order not to do so by a supervisor. Reiber testified that he clocked in for Reese as he was approaching the platform, arms laden with coffee-making supplies. However, the supervisors on the scene claimed they did not see Reese. Although the Company has a policy against employees punching other timecards, it was rarely if ever enforced. Numerous employees testified that it was commonplace for employees to clock in for coworkers within the presence of and without comment from supervisors.

In the 6 months following his June suspension, Reiber received another 27 written warnings. Several were for bidding on weekend-shift work for which he was ineligible. Respondent acknowledged that this was a minor infraction of a complicated set of rules and stated that the notices were not taken into account in subsequent grievance proceedings. However, that does not detract from the fact that Reiber was warned against a practice which many employees followed. Two other letters were for delaying freight, the same offense which had contributed to his June discharge. Within 1 week in July, Reiber received three warnings for arriving to work 4 to 15 minutes late which were the basis of an attendance hearing conducted by Flaig early in August. Five other warnings addressed Reiber's leaving work prior to completing his 8-hour shift.

Hours of Service Violations: Reiber also received nine warning letters for exceeding the maximum number of hours an employee is permitted to drive, otherwise known as an "hours of service" violation. In accordance with a Department of Transportation (DOT) regulation, which prohibited workers driving more than 70 hours within an 8-day period, the Company required its drivers to keep track of their hours and advise the dispatcher when they were nearing the ceiling so that their schedules could be accommodated.

Reiber initially took the position that the regulation did not apply to city drivers, but that, if it did, only actual delivery driving time and not all time on the clock was covered. Accordingly, Reiber refused to inform dispatchers when he neared or exceeded the maximum hours permitted. In fact, on at least one occasion in 1978, when he reached the 70-hour limit, Reiber simply parked his vehicle prior to the completion of his shift, thereby compelling another employee to chauffeur him to the terminal. In response to Reiber's protest, the Company advised him that the DOT regional office had confirmed its construction of the regulation.

After receiving an hours-of-service warning in July 1979, Reiber filed a grievance in support of his position. This was denied by the local joint area panel on September 21. Notwithstanding the panel's decision, Reiber continued to ignore the hours-of-service rule and consequently received eight additional hours-of-service warning letters between October 1 and November 6.

The December 19 Discharge

Although all his warning notices became part of the record at subsequent grievance hearings, the immediate and most serious grounds for his final discharge on December 19 was for stealing time.

On several occasions in the summer of 1979, Flaig received information from employees of customer firms that Reiber was seen on one occasion spending excessive time at a restaurant and, at another time, sleeping in the cab of his truck. Flaig's initial attempt to trail Reiber and verify these accusations proved unsuccessful. However, on November 2, Flaig fortuitously came upon a company truck parked outside the loading dock of a building. Since no loading or unloading was taking place, Flaig contacted the dispatcher and found that the truck was assigned to Reiber. He continued to survey the truck until Reiber emerged from the restaurant some 45 minutes after Flaig began his vigil.

Flaig met with Reiber at the end of the day and admonished him for stealing time in violation of the Company's rule.[11] Reiber conceded he might have taken an additional 10 minutes beyond the prescribed 35-minute break, but retorted that he would take as long as necessary to eat his lunch.[12]

On hearing about Reiber's unrepentant attitude, Jankovich decided that more stringent efforts were warranted to find out whether Reiber was stealing time.[13] Accordingly, in order to avoid dispute over the reliability of any evidence which might be uncovered, private investigators from Nuckols Associates, a firm which provided Respondent's security guard services, was engaged to follow Reiber.

Nuckols' first attempt to trail Reiber in late November was unsuccessful. However, on each of four subsequent occasions, Nuckols' surveillance disclosed that Reiber was exceeding his 35-minute lunch break. Thus, on December 4, the Nuckols' detectives clocked Reiber enter-

[10] The contract granted reasonable and necessary time off without pay provided the Union gave 48 hours' written notice.

[11] In January 1979, Respondent's city drivers and dockworkers ratified an agreement between Local 100 and Respondent which eliminated the unpaid 30-minute lunch period. Thereafter, employees were permitted to aggregate their 20- and 15-minute break periods and were paid for a straight 8-hour day.

[12] Reiber contended that he promised Flaig he would attempt to confine himself to a 35-minute break. However, there is little in this record which convinces me that Reiber would respond to Flaig in such an understanding and cooperative manner. Indeed, Jackson, a personal friend of Reiber, testified that, on a subsequent occasion, he heard the steward say virtually the same defiant words to Flaig that Flaig attributed to him at their November 2 exchange.

[13] Respondent also stated that it hired private investigators because it was short of supervisory staff at the time. I find this explanation inconsistent with Flaig's spending numerous hours with the Nuckols' detective on December 13 and 17.

ing a restaurant at 11:45 a.m. and leaving an hour later. Reiber became aware that he was being followed that afternoon and managed to follow the investigators' vehicle and obtain its license plate number. Later that day, when Reiber attempted to extract a confession that the Company was responsible for the surveillance, Flaig denied any knowledge. Flaig's protestations were somewhat disingenuous for although he did not know that the surveillance had commenced he was aware that arrangements with Nuckols were made. On December 5, Reiber again was observed exceeding his lunch break by 38 minutes and taking an additional 22-minute break later in the afternoon during which time he was seen reading a newspaper. On December 13 Nuckols videotaped Reiber's extending his lunch break by 45 minutes and thereafter spending an additional 23 minutes talking with another truckdriver outside the restaurant.[14] Finally, on December 17, Reiber was detected taking an additional 34 minutes for lunch.

The parties presented conflicting testimony as to when Respondent first advised Reiber he was under surveillance. Reiber contended that, after Flaig's initial denial, he was unaware he still was being followed until he received three warning notices, which arrived together on December 15, accusing him of stealing time on December 4, 5, and 13. However, Flaig testified that after receiving oral reports from Nuckols he told Reiber either on December 6 or 7 that the Company was following him and had evidence of his stealing time.

There is reason to believe that Flaig's account is true. Although the record is somewhat ambiguous in this regard, Donald Jackson related that he was present at a meeting at which Reiber told Flaig that he would take as much time as he needed for his lunch. Since Jackson was absent on November 2, he could not have been referring to Flaig's reproaching Reiber for stealing time on that date. Nor could he have been referring to the December 19 company level hearing since it was attended by a number of persons in addition to Flaig and Reiber. Therefore, it is a fair inference that Jackson was referring to the December 6 or 7 meeting which Flaig described.

Even without Flaig's admission, Reiber had good cause to suspect he was under surveillance, since he testified that by December 6 he traced the license plate on the car following him to Nuckols.

Without any doubt, Reiber knew of the Company's surveillance by December 15 when he received the three warning letters. Yet, on December 17, he again was observed exceeding his break.

As summarized in the letter issued to Reiber subsequent to his company level hearing on December 19, his discharge was not only triggered by his misconduct in stealing time but also was based on the entirety of his work record for the preceding 9 months. The next panel which heard Reiber's grievance, the Cincinnati Joint Area Committee, produced a deadlocked decision, thereby leaving intact the discharge decision. An appeal then was taken to the next level in the grievance machinery. However, the Joint State Committee also deadlocked. Thereafter, the discharge was grieved to the Joint Central States Area Committee sitting in Chicago, which after taking evidence and hearing testimony on March 12, 1980, voted unanimously to deny the grievance.

Local 100's business agent presented Reiber's case stating briefly that the numerous warning letters in the file Respondent submitted to the panel were misleading; that although Reiber admittedly stole time he performed all his scheduled work; and that his 14 years' employment should not be disregarded. Reiber also spoke briefly in his own behalf but did not deny overextending his lunch breaks.

The explanations which Reiber provided the Chicago arbitration proceeding and at the hearing in this case do little to vindicate him. Thus, he explained that, on December 4, he spent 5 to 15 minutes discussing the purported surveillance with other truckdrivers at the restaurant. Reiber further explained that, on December 5, he checked the license plate number of the car which had followed him with a mechanic at the garage opposite the restaurant who initially spotted the private detectives. The visit to the garage was not noted in the Nuckols' report, but even if Reiber stopped on that date he took an unnecessarily lengthy time to accomplish a rather simple task. Reiber defended his late afternoon break on December 5 by stating that for part of the time he was completing his paperwork. He did not deny that he also may have read the newspaper. Reiber suggested that his extended lunch break on December 17 was the result of having to wait to unload at a business adjacent to the restaurant. However, after Flaig pointed out that there were no scheduled stops at that firm on the date in question, Reiber subsequently testified that the delay in unloading could have occurred on December 13 and that December 17 might have been the date on which he spent an additional 20 minutes during his break talking to a union official about a debt owed him.

In further defense of his actions, Reiber pointed out that he was assigned to a regularly scheduled daily 3 p.m. pickup at a firm, Gold Medal, for which he had to arrive with an empty trailer, and that on many occasions he had to wait as long as an hour or two before his trailer was loaded. In other words, Reiber was suggesting that it was either a question of his waiting at Gold Medal or waiting at the restaurant.

Jankovich and dispatcher Robert Mullaney contradicted Reiber's assertions, pointing out that Gold Medal was a seasonal account and that, in the winter months, it was unnecessary for Reiber to arrive there with an empty trailer. Respondent's dispatchers further asserted that Reiber rarely called in to them before 1 or 2 p.m. They suggested that, if Reiber emptied his trailer earlier in the day, and contacted them promptly, as standard practice required, they could have scheduled him for additional pickups.

The essence of the General Counsel's case was not that Reiber was falsely accused of stealing time, but rather that his behavior was no different from that of

[14] Respondent offered into evidence at the hearing videotapes taken of Reiber's activities on December 13 and 17. The General Counsel viewed the tapes subsequent to the hearing and did not oppose their admission. I, too, viewed the tapes after the hearing and, without objection from counsel, hereby admit them into evidence.

many other employees who suffered no reprisals. For example, driver Robert Greiner testified that he occasionally spent over an hour on a lunch break while waiting for his truck to be unloaded. However, he further explained that the normal practice was for the driver to call the dispatcher and explain the cause for the delay. Patrick Eick, too, reported having downtime due to loading delays encountered at various firms, but did not believe that such periods were regarded by management as stealing time. In fact, a witness for Respondent explained that drivers were required to obtain signed acknowledgments from customers who caused such delays so that waiting time could be billed directly to those accounts.

Both Greiner and Eick admitted that they stole about 10 minutes several times a week. Eick also testified that he frequently breakfasted with other Consolidated Freight drivers. However, Eick obviously was unaware until the hearing that employees were permitted to consolidate their breaks and he indicated that he occasionally exceeded his morning break because he often was too busy in the afternoon to take any time off. It is unclear from the record whether he was using his morning break when he referred to joining coworkers for breakfast, or over what period of time the drivers regularly met at the restaurant.

There was substantial evidence that management followed drivers other than Reiber on a somewhat routine basis. For the most part, supervisors would monitor the movements of drivers if they happened to encounter them adventitiously during the day. Some surveillances were more purposeful. Thus, the Company's most notorious time stealer, driver Norm Languendaro, after working a 9-hour day for a number of months, and another driver, Glen Johnson, were followed by Flaig in January 1979, found to be stealing time, and given suspensions which were reduced to 2 days at the Union's intervention. Languendaro's expression of contrition at his hearing apparently was genuine since when he was followed by a Nuckols detective in January 1980, no evidence of wrongdoing was disclosed.

IV. DISCUSSION

A. *Deferral to Arbitration Is Inappropriate*

At the outset it is necessary to determine whether the decisions reached by arbitration panels below should preclude a decision on the merits in this forum.

Since *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), the Board in preferring the voluntary resolution of labor disputes between parties has deferred to arbitration results where (1) the proceedings were fair and regular, (2) the parties agreed that the proceedings were final and binding, and (3) the award was not clearly repugnant to the purpose and policies of the Act. The Board also has engrafted onto the *Spielberg* doctrine the requirement that evidence bearing on the unfair labor practice must have been presented to and considered by the arbitrator if the Board is to refrain from hearing the matter. *Raytheon Company*, 140 NLRB 883 (1963); *Suburban Motor Freight, Inc.*, 247 NLRB 146 (1980).

The arbitration panels which reviewed Reiber's grievances did not consider the question of unlawful motivation for Reiber's discharges and thus there was no compliance with the *Raytheon* criterion. There is no evidence that the local area joint committee or the Chicago tribunal heard evidence comparing Reiber's treatment at Respondent's hands to that accorded to other employees. Nor was any evidence presented to the grievance committees that Reiber might have been victimized as a consequence of his aggressive handling of union grievances or for his presumptuousness in meeting with Guy Cutler. To the contrary, several employees familiar with the way the local panel functioned testified that evidence about employees other than the grievant was considered inappropriate. The transcript of the proceeding before the Central States Area Committee reveals that Reiber and his union representative vaguely alluded to the fact that taking extended breaks was commonplace. However, the questions raised by the members of that panel reveal that they were interested primarily in hearing why Reiber exceeded his breaks. No inquiry was made into the circumstances of the surveillance or whether other employees were similarly investigated and disciplined.

Contrary to Respondent's argument, it is not sufficient that Reiber had the opportunity to offer evidence of discriminatory treatment even if he purposely chose not to do so. This is particularly true in this case where Glen Strunk, the business agent presenting Reiber's case, may not have been motivated to provide him effective representation.[15] Accordingly, in these circumstances, deferral to arbitration would be particularly inappropriate. See *United Parcel Service, Inc.*, 252 NLRB 1015 (1980); *Suburban Motor Freight, supra.*

B. *Reiber's Discharges Were Lawful*

The facts in the extensive record of this case create considerable difficulty in determining Respondent's motivation for dismissing Reiber. On the one hand, there is some basis for inferring that Reiber was discriminated against for aggressive defense of employee rights; on the other, there is substantial evidence that Reiber engaged in egregious misconduct sufficient to warrant discharge. In dual motive cases such as this, *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), imposes upon the General Counsel the initial burden of making a *prima facie* showing that the protected conduct of the discharged employee was a motivating factor in the employer's decision. Once this is accomplished, the burden shifts to the employer to demonstrate by a preponderance of the evidence that it would have taken the same actions even in the absence of the protected activity.

Here, the General Counsel has established that Reiber was a zealous union steward who tenaciously pursued grievances on behalf of his fellow workers and held management to strict compliance with the terms of the collective-bargaining agreement. Moreover, as I found above, Respondent's terminal manager threatened Reiber with discharge because of his temerity in bypassing the Company's chain of command in meeting with Guy Cutler. Although there is no evidence that management

[15] At the time of the hearing, Reiber was running for the position of business agent on a ticket which was opposing the current union leadership.

was aware of the subjects discussed at their meeting, this does not detract from the conclusion that participation in such a meeting was a protected activity and that a threat made in response to such participation is a violation of Section 8(a)(1) of the Act.

In addition, evidence introduced in the General Counsel's case in chief suggests that Reiber received a number of warning letters for certain types of conduct—tardiness, leaving work early, punching another employee's timecard, signing bid sheets, or stealing time—where the same conduct by other employees was sometimes ignored or dealt with in a less repressive way. Other warnings, particularly those for delay of freight, also suggest that Respondent's purpose was to circumscribe Reiber's union activity. On closer examination I find that the issuance of some, but not all, of these notices was discriminatory.

When Reiber was late for work three times in 1 week by no more than 15 minutes, three warning notices issued. Yet, Reese, for whom lateness was a recurring problem, received only one or two such notices for the entire year. Although Respondent established that it held attendance hearings and even imposed sanctions for other employees with attendance problems, the record suggests that those employees were habitual offenders. Hearings on Reiber's attendance record were held in prior years, but no evidence was adduced showing that he had chronic problems in 1979. Similarly, Reiber received a total of five warning letters in 1979 for failing to complete his shift in contrast to other employees who testified that they left early 10 or 12 times in the same year and received at the most one or two such warning letters.

Respondent also stated that it issued a warning letter which invoked a contractual requirement of 48 hours' written notice before Reiber legitimately could leave work on union business only because his leaving early was getting out of hand. However, Respondent issued the warning letter to Reiber without orally advising him in advance that henceforth it would insist on strict compliance with the collective-bargaining agreement, although this was contrary to its avowed practice. Respondent further attempted to explain that its warning to Reiber for punching another employee's timecard was based solely on his defying a supervisor's instruction. However, Respondent's justification fails to provide any explanation of why the supervisor's command was given at all when other employees regularly punched each other's timecards in the presence of supervisors.

The warning notices which Respondent sent to Reiber for delaying freight also were improper. Where, as here, the collective-bargaining agreement does not expressly limit the amount of time a steward may devote to union activities, then there must be an accommodation between the steward's contractually guaranteed right to have "reasonable time" for such duties and the employer's right to expect productive work. Compare *Northeast Constructors, Division of Cives Corp.*, 198 NLRB 846 (1972), with *Cameron Iron Works, Inc.*, 194 NLRB 168 (1971), and *Warner Gear Division, Borg-Warner Corporation*, 102 NLRB 1223 (1953). In striking the proper balance, factors to be weighed include the number of employees in the unit, the number of disputes which typically arise, whether the steward could have performed his duties at other times, and whether the employer was consistent in its protest of the steward's efforts. *Northeast Constructors, supra* at 851.

Applying these criteria to the instant case, the record shows that there were approximately 120 to 140 drivers and dockmen in Reiber's unit, more than the number of employees which the Board found in *Northeast Constructors* imposed considerable demands upon the steward's time. Reiber testified that three or four workers presented complaints every day. Assuming that a discussion of each complaint consumed an average of 15 minutes, then an hour is not an extraordinary amount of time to deal with such matters. There also was evidence that Reiber spent considerable time after hours pursuing union matters. Moreover, he was out of the terminal for much of the day, so that whatever time he took to process grievances had to be confined to the early morning hours. Therefore, Respondent's insistence that Reiber limit himself to one-half hour and handle additional grievances on his own time hardly presented a feasible solution. Although Flaig claimed that he heard Reiber discuss nonunion matters during these morning complaint sessions, there was no showing that this was invariably or even frequently the case, or that the warning notices were directed to such abuses.

Also disturbing in Respondent's position was its failure to object to Reiber's delaying freight until the spring of 1979 when the record indicates that Reiber's daily meetings of an hour or more were a longstanding practice. Further, Respondent's imposition of a one-half hour limitation on Reiber's daily meetings was never mentioned in the warning notices issued to him and only became a company policy after the steward's June discharge hearing before the local area grievance committee. Even then, insistence on a fixed period of time is wholly at odds with the open-ended concept of "reasonable time." It must be inferred that this vague language was purposely used in the collective-bargaining agreement in order to cover situations where less as well as more than one-half hour was needed. In the absence of an express limitation on the amount of time the steward could reasonably take, Respondent had a duty to seek an adjustment with the Union, and not by taking arbitrary action against Reiber, unilaterally insist on its construction of the contract.[16] Accordingly, I conclude that Respondent retaliated against Reiber for taking what was regarded as an excessive amount of time to perform his steward's duties in contravention of Section 8(a)(1) and (3) of the Act. Compare *Northeast Constructors, supra* at 851, fn. 21, with *Cameron Iron Works, Inc., supra* at 172, fn. 6. See also *Max Factor & Co.*, 239 NLRB 804 (1978).

However, I find that the warning letters sent to Reiber for "hours of service" violations were completely warranted. The rule limiting driving time to 70 hours during

[16] Although Respondent presented the question of "reasonable time" to the local grievance panel reviewing Reiber's June discharge, thereby suggesting that it asserted its position in good faith, I do not regard this as the sort of accommodation the Board intended in *Northeast Constructors, supra.*

an 8-day period was not of the Company's making, but a Government regulation. After Reiber tested his position and lost before the local area panel, his actions in purposely continuing to flout the rule were impermissible and demonstrate again his unwillingness to yield to legitimate authority.

Thus, with the exception of the hours-of-service warning notices, and those for stealing time to be discussed *infra*, the disciplinary letters which Respondent issued to Reiber in 1979 were violative of Section 8(a)(1) and (3) of the Act. Having reached this conclusion, it does not necessarily follow, as the General Counsel contends, that Respondent was building a case against Reiber which was intended to lead inevitably to his discharge. Rather, I infer that in issuing many of its warning notices to Reiber management officials were imposing upon the steward a duty to conform his conduct to the strict letter of the Company's rules, in precisely the same manner as they believed he was requiring them to adhere to the letter of the collective-bargaining agreement. There was ample testimony that Reiber found, pursued, and won grievances where others would not have thought to look. Although Reiber clearly had the right to scrupulously enforce the contract, management clearly felt just as righteous in exacting from him rigorous and exemplary compliance with the literal rules of the workplace. However, it is well settled that an employer may not, as it did here, require conduct from one employee which it does not require of others because of that employee's union activities. See, e.g., *General Motors Corporation*, 239 NLRB 34 (1978); *The Anthony Company d/b/a El Dorado Club*, 220 NLRB 886, 888 (1975).

The evidence presented by the General Counsel as outlined above was sufficient to meet the burden of proof for a *prima facie* case of a discriminatory discharge. However, in weighing the evidence in the entire record, I am compelled to conclude that Respondent has met its burden; it has shown by a preponderance of the evidence that the January, June, and December, 1979 dismissals were precipitated and motivated by Reiber's serious misconduct and not by illegal considerations.

Reiber was first discharged in January 1979 because of his pivotal role in causing an unauthorized work stoppage in violation of the collective-bargaining agreement. Reiber's discharge on this occasion was not alleged in the complaint to have been unlawful; rightly so, for it is clear that the steward's activity was unprotected.

The Board has held consistently that an employer's disciplining of union officials for taking an active or leadership role in an unauthorized illegal work stoppage, such as the one which Reiber provoked, is not discriminatory. See *Chrysler Corporation Dodge Truck Plant*, 232 NLRB 466 (1977);[17] *J. P. Wetherby Construction Corp.*, 182 NLRB 690 (1970).

Here, Reiber acknowledged that he was instrumental in preventing casuals from working on December 30 with full knowledge that his conduct contravened the strict terms of the collective-bargaining agreement. The union president's presence at the scene did nothing to legalize Reiber's actions. If Kaiser were Respondent's employee, his union office could not have shielded him from discipline any more than Reiber's stewardship could protect him. Reiber went beyond the limit of misbehavior that an employer must tolerate when he threatened the casuals, ordered the other regular employees not to work with them, and then defiantly told Flaig he would persist in his efforts to drive the casuals away. While it is true that Reiber was intent on preserving work for more senior employees, this does not legitimize the way he chose to express his concern. Therefore, Respondent was totally justified in discharging Reiber. Its decision to reinstate him following a 2-week suspension does not mean that Reiber's misconduct was less harmless or that it was condoned, only that a less harsh penalty would be imposed. Reiber's discharge on this occasion is significant, not only because it was taken into account as part of his total work record at his June discharge hearing, but also because the record in that case reveals a fairly typical pattern in the steward's behavior. In his zeal to enforce the collective-bargaining agreement, Reiber apparently viewed himself as free from reasonable limitations on his conduct. However, holding a union position does not insulate an "employee from otherwise legitimately imposed discipline for engaging in an unprotected activity." (Member Truesdale dissenting in *Armour Dial, Inc.*, 245 NLRB 959 (1979), enforcement denied 638 F.2d 51 (8th Cir. 1980).)

Reiber's disregard for discretion which resulted in the work stoppage incident apparently led to the event which precipitated his discharge in June, the Gary Breeden timecard incident of June 15. What began as a defense of another employee's interests rapidly degenerated into a virulent attack on a supervisor. In defining the boundary between justifiable and impermissible conduct arising during the course of a stormy confrontation on the labor scene the Board has examined such factors as "the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Company*, 245 NLRB 814 (1979).

Measured against these standards, Reiber's role in the Gary Breeden timecard incident was indefensible. The disputed question was a legitimate subject for a grievance proceeding and, in fact, was ultimately grieved successfully. Had Reiber's obscene outburst arisen out of the *res gestae* of such a grievance hearing, it might be defended or excused;[18] instead, the encounter took place on the dock in the presence of other employees. It is also significant that Reiber was not provoked to act as he did on this occasion by any profane or abusive language on the part of Shoenhoff. Only Reiber became enraged; so much so, that Reese saw fit to lead him away just as Shoenhoff was about to summon the police.

Even if Reiber were reacting to what he regarded as an improper supervisory decision, the belligerent and in-

[17] Causing or initiating a work stoppage in violation of a no-strike provision in a collective-bargaining agreement must be distinguished from mere participation in such activity. See, e.g., *Precision Castings Company, Division of Aurora Corporation, a wholly owned subsidiary of Allied Products Corporation*, 233 NLRB 183 (1977).

[18] See, e.g., *Thor Power Tool Company*, 148 NLRB 1379 (1964).

subordinate method with which he chose to contest it was a repudiation of the grievance process. Reiber's conduct on this occasion and during the work stoppage of the casuals was unprecedented and bears no comparison to ordinary arguments between other employees and supervisors during which curse words were routinely exchanged. Consequently, contrary to the General Counsel's argument, I find that Reiber's actions with respect to the Gary Breeden timecard episode, occurring not long after the work stoppage of the casuals, were so serious as to remove him from the protections of the Act.

Reiber's inability to conform to the legitimate business expectation of the Employer also explains his final discharge for stealing time. There is no question as to whether Reiber stole time or whether such conduct was impermissible for evidence shows that Reiber did steal time and that the Company's policy forbade such a practice. Rather, the issue here of whether Respondent violated the Act is tied to the troublesome question of whether the surveillance of Reiber was so extraordinary and unparalleled, and the subsequent discipline so abnormal and unwarranted as to prove that he was discriminated against in reprisal for his union activities.

I am persuaded, although not beyond a reasonable doubt, that Respondent's decision to follow Reiber was triggered by his actions as an employee and not because of his activism in union affairs. Cf. *United Parcel Service, Inc.*, 252 NLRB 1015 (1980). Flaig's initial surveillance of Reiber came about only after he received independent reports that Reiber was malingering.[19] When he was unable to locate Reiber on his own during the summer, he did not pursue the matter. Not until 3 months later when he inadvertently found Reiber exceeding his lunch break was the problem resurrected. When confronted on November 2, Reiber gave Flaig every reason to believe he would continue to steal time with impunity. No employer could ignore such a deliberately provocative posture. In these circumstances, it cannot be concluded that Respondent invented reasons to follow Reiber. As in *Pork King, Company, Inc.*, 252 NLRB 99 (1980), the decision to follow Reiber "must be ascribed to legitimate concern about his work habits."

What the General Counsel claims is extraordinary in Reiber's case is that the surveillance was conducted by a private detective. While such an occurrence was unusual, it was not without precedent. Jankovich relied on detectives at other Consolidated Freightways terminals and engaged a private detective to track down rumored misconduct by Reiber in 1977. Respondent also turned to Nuckols Associates to check on another driver in 1980. Further, as Flaig explained, resort to third party surveillance would obviate any quarrels about credibility when the time came to confront Reiber with proof of his dereliction. Where, as here, the surveillance was not unlawfully motivated, evidence produced by that surveillance that an employee was engaged in misconduct need not be ignored. See *Pork King Company, supra.*[20]

The General Counsel points out that Respondent's usual practice was to confront employees with evidence of their wrongdoing immediately and then counsel them to improve. In Reiber's case, the General Counsel submits, Respondent concealed the findings of its surveillance until December 15, thereby revealing that it was intent on building a case against him. This argument does not withstand scrutiny. Flaig put Reiber on notice as early as November 2 that his stealing time would not be tolerated. Moreover, as found above, Flaig gave Reiber notice on December 6 or 7 that he had been followed and had proof Reiber was stealing time. If Reiber's response to Flaig on that occasion had been less defiant, it is unlikely that Respondent would have considered it necessary to continue its surveillance. Instead, Reiber persisted in maintaining he would take as much time as he saw fit. Then, either because he was indifferent to or contemptuous of management's prerogatives, Reiber continued to take extended breaks. Since Nuckols followed Reiber on random days, Respondent could reasonably conclude that Reiber was stealing time habitually. It was not Respondent but Reiber who applied the bricks and mortar to construct a case against himself. Reiber may have been correct in regarding 35 minutes as too brief a time to consume a lunch, but this was a condition of employment which he and other employees had expressly approved.

The General Counsel further alleges that stealing time was commonplace among other employees; yet, not many were followed, and the few who were received penalties far less severe than those imposed on Reiber.

Respondent may not have engaged in scrupulous surveillance of every driver who it suspected was abusing his breaks. This does not mean, however, that it ignored violations of its rule against stealing time when potentially flagrant or persistent breaches came to its attention. Thus, in addition to random observation of drivers on a sporadic basis, the record shows that, in 1979, three offenders were subject to planned surveillance. None of them suffered severe penalties, but then none of them had been suspended for just cause twice before in the same year; nor had they, when reproached, refused to reform.[21]

[19] The General Counsel criticized Respondent's failure to call, as corroborating witnesses, the women who had reported Reiber's delinquency. I draw no conclusions that Respondent chose not to adduce such testimony for fear it would be adverse, where the General Counsel also could have subpenaed those witnesses on rebuttal and did not do so. Where witnesses are equally available to either party, no inferences that their testimony would be unfavorable is warranted. 10 Wigmore, *Evidence* §1017, 1017-18 (3d ed. 1942).

[20] In *Pork King, supra*, the Board noted that the General Counsel specifically disclaimed an intent to label the surveillance unlawful. In the present case, the surveillance was not alleged in the complaint as an 8(a)(1) violation, but, on brief, the General Counsel did refer to it as extraordinary and unprecedented, thereby suggesting that it was illegally motivated. Having found, in disagreement with the General Counsel, that the surveillance of Reiber was not illegal, it is unnecessary to reach the question of whether the complaint must specifically allege that the surveillance violates the Act before the fruits of that surveillance may be regarded as tainted.

[21] Testimony was adduced at the hearing that, at a February 1980 meeting with company drivers, Jankovich told the drivers they need not fear the loss of overtime pay which might result from the introduction of the flexible workweek because they were smart enough to obtain overtime work during the regular workweek. Even if Jankovich made the statement in precisely the terms the witnesses alleged, I do not find that this demonstrates that Jankovich condoned stealing time, as the General Counsel suggests. Jankovich's remark was a single spontaneous utterance

Continued

Even after obtaining evidence that Reiber was stealing time, the outcome of December 19 was not a foregone conclusion, for Respondent had a proven record of giving employees, including Reiber, a second chance when there was some acknowledgment of wrongdoing and a promise of improvement. Instead of indicating any remorse or intent to revise his conduct, as Reese did when called on the carpet about his attendance record, or as Languendaro did when accused of stealing time, Reiber maintained the bravado which typified much of his conduct.[22] His behavior contrasts unfavorably with that of the employee in *United Parcel Service, supra*, who, unlike Reiber, had an unremarkable work record, only briefly overstayed his break, if at all, and exhibited great concern to adhere to the allotted time so that he not jeopardize his job. In the face of Reiber's insolence and a consistent record of defiance when disciplined, Respondent could not ignore his stealing time with any expectation that he would mend his ways. Thus, Respondent had legitimate, independent, and substantial justification for Reiber's discharge in December notwithstanding its disparate treatment of him on other occasions.

In the final analysis, I am not persuaded that Respondent was driven to discharge Reiber because he was a zealous union advocate or because he met with Guy Cutler. Respondent had had a lengthy and apparently stable relationship with Local 100. At least, no evidence was adduced of bitter struggles with or hostility toward the Union. Cf. *United Parcel Service, supra*, where the employer's hostility toward the employee organization involved therein was well documented. Discharging Reiber did not mean an end to Respondent's relationship with the Union or a cessation of its obligations under the collective-bargaining agreement. Respondent certainly recognized that another steward would take Reiber's place. I have no doubt that Reiber was an aggressive steward who was genuinely concerned about the interests of his fellow workers, but being persistent did not necessarily make Reiber more effective. The record shows that there was no appreciable difference in the number of grievances filed during Reiber's or his predecessor's stewardship. Because Reiber settled more complaints at the company level did not mean that management was able to evade its responsibilities when the former steward was compelled to carry forward a greater number of grievances to the city panel. Indeed, the fact that a greater number of complaints were resolved during the weekly meetings at the terminal suggests not only that Reiber was an effective negotiator, but also that management officials were willing compromisers. Reiber himself acknowledged that Jankovich did not resist settlements when he was shown that the Company had erred in some contractual matter.

Further, I do not attach great significance to Jankovich's threat that he would remove Reiber from the seniority list following his meeting with Guy Cutler. Jankovich's threat was made in the first flush of irritation at learning of Reiber's audacity. If he intended to make good on that threat, he waited an extraordinarily long time to do so. With the exception of one warning letter in mid-February, there was a 3-month hiatus between Reiber's January 23 meeting with Cutler and the receipt of the next warning notice in late April. This timing goes far to negate a cause and effect relationship between Jankovich's threat and Reiber's subsequent discharge.

Respondent obviously had no regrets in dismissing Reiber and surely was pleased when presented an opportunity to do so. But the cases are legion which hold that the fact that an employer may wish to dispense with an employee whose union activities have made him unwelcome does not necessarily establish that the subsequent discharge of that employee was unlawful. If the employee obliges the employer by providing a valid, independent reason for discharge, by engaging in conduct for which he would have been discharged anyway, his dismissal for that reason cannot be ruled discriminatory. See, e.g., *Anderson-Rooney Operating Company and Ninth and Detroit Building Corporation*, 134 NLRB 1480, 1495 (1961); *Klate Holt Company*, 161 NLRB 1606, 1612 (1966). The Supreme Court's dictum in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 286 (1977), also bears repeating in balancing the competing interests in this case:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[23]

Although the General Counsel has presented some circumstances in the present case which tend to cast doubt on the legitimacy of Respondent's asserted motive, Respondent has succeeded in surmounting these doubts by a preponderance of the evidence that Reiber's discharges in June and December 1979 would have occurred independently of his involvement in union activity. Accordingly, I shall recommend dismissal of those allegations in the complaint relating to the allegedly discriminatory dismissals.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 100 is a labor organization within the meaning of Section 2(5) of the Act.

and was made under the pressure of trying to sell the flexible workweek to the employees. Testimony of his prior experience of waking an employee found sleeping on the job is sufficient demonstration that he did not tolerate stealing time.

[22] A series of disciplinary notices issued to Reiber in 1976 reveal that his rebellious attitude predated his term as steward. The notices warn Reiber against further use of road-powered equipment without permission. In a supporting memo, the supervisor wrote that in spite of repeated oral and written warnings Reiber insisted he would continue to use the equipment as long as such units were in the yard, since they had more comfortable seats than those in the city tractors he was supposed to drive. (See Jt. Exhs. 12, 14, and 16-18.)

[23] Quoted with approval in *Wright Line, Inc., supra.*

3. By issuing warning notices to Thomas Reiber because of the amount of working time spent by him on union duties as a steward,[24] and in retaliation for his aggressive enforcement of the collective-bargaining agreement,[25] Respondent violated Section 8(a)(3) and (1) of the Act.

4. By threatening Reiber on January 24, 1979, because he met with a senior corporate executive of the Company, Respondent unlawfully discriminated against and violated his and other employees' rights in violation of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, and substantial effect on interstate commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not act unlawfully in discharging Thomas Reiber on June 19 and December 19, 1979.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and that it be required to take certain affirmative actions designed to effectuate the purposes and policies of the Act.

In particular, having found that Respondent threatened Thomas Reiber with discharge for having met with a senior corporate executive, and issued written warnings to him because of the amount of working time spent by him on his union duties as a steward, and in retaliation for his aggressive enforcement of the collective-bargaining agreement, I shall recommend that the Respondent cease and desist from such conduct.

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[26]

The Respondent, Consolidated Freightways Corporation of Delaware, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing warning notices to any employee who serves as steward for the labor organization which represents its employees, because of the amount of working time that steward spends attending to union duties, particularly with respect to the processing of grievances.

(b) Issuing warning notices to any employee because he is engaged in union or other concerted activities.

(c) Threatening any employee with discharge or other disciplinary action because he is engaged in union or other concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act. Cf. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Post at its Cincinnati, Ohio, terminal copies of the attached notice marked "Appendix."[27] Copies of said notice, after being duly signed by representatives of Respondent, shall be posted by Respondent immediately upon receipt thereof and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that, insofar as the amended consolidated complaint herein alleges other violations of the Act which have not been found, the amended consolidated complaint is hereby dismissed.

[24] The Charging Party was unlawfully warned for delaying freight by refusing to leave Respondent's terminal as dispatched on May 3, 24, and 25, June 8, and November 5 and 7, 1979.

[25] Other discriminatory warning notices were issued to the Charging Party on Febuary 19, May 3 and 22, June 8, July 9, 17, 20, and 22, August 8, 9, and 11, and December 3, 7, and 10, 1979.

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of a United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT issue warning notices to the employee who serves as steward for the labor organization representing our employees because of the amount of time spent by that steward attending to his union duties, particularly with respect to the processing of grievances.

WE WILL NOT issue warning notices to any employee because he is engaged in union or other concerted activites.

WE WILL NOT threaten any employee with discharge or other disciplinary action because he is engaged in union or other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE